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IN THE

Supreme Court of the United States

LAURENCE J. BARDOFF,
Petitioner,

v.

STATE BAR OF CALIFORNIA AND THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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PETITION FOR A WRIT OF CERTIORARI

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December 29, 2008

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QUESTION PRESENTED

Did the California State Bar and Board of Bar Examiners violate the Supremacy Clause of the federal Constitution when, contrary to the decision of this Court in *Sperry v. Florida*, 373 U.S. 379 (1963), they refused to give effect to Petitioner's federally granted status as an attorney admitted to practice law before a national jurisdiction – the United States Tax Court – and denied him his consequential right under state statute to sit for the "Attorneys' Examination" for admission to the California Bar?

CORPORATE DISCLOSURE STATEMENT

As an individual, Petitioner is not required to make a corporate disclosure statement.

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No. 08-__

LAURENCE J. BARDOFF,
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STATE BAR OF CALIFORNIA AND THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR A WRIT OF CERTIORARI

Laurence J. Bardoff respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of the State of California

OPINION AND ORDERS BELOW

On October 1, 2008, the California Supreme Court entered a summary order denying Petitioner's petition for writ of review. A copy of the court's order is attached as Appendix I, p. 43a.

Petitioner's Petition for Rehearing was "stricken" by the court's order on October 17, 2008. (Appendix K, p. 46a.)

Petitioner appeared *pro se* before the California Supreme Court.

JURISDICTION

On October 1, 2008, the California Supreme Court entered an unpublished summary order (the "Order") denying Petitioner's "Petition for Writ of Review." (Appendix I, p. 43a.)

On October 17, 2008, the California Supreme Court entered an order that Petitioner's petition for rehearing, filed October 16. 2008, "is hereby stricken." (Appendix K, p. 46a.)

This Court has jurisdiction under 28 U.S.C. § 1257 to review the Order on writ of certiorari.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

A. Constitution of the United States

Article VI, Clause 2 (the "Supremacy Clause"):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. Title 26, United States Code:

§7441. Status

> There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.

§7442. Jurisdiction

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10–87), or by laws enacted subsequent to February 26, 1926.

§7445. Offices

The principal office of the Tax Court shall be in the District of Columbia, but the Tax Court or any of its divisions may sit at any place within the United States.

§7452. Representation of parties

. . . No qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling.

§7453. Rules of practice, procedure, and evidence

Except in the case of proceedings conducted under section 7436 (c) or 7463, the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia.

C. Rules of Practice and Procedure of the United States Tax Court:

RULE 200. ADMISSION TO PRACTICE . . .

(a) Qualifications: (1) *General:* An applicant for admission to practice before the Court must

establish to the satisfaction of the Court that the applicant is of good moral and professional character and possesses the requisite qualifications to provide competent representation before the Court. In addition, the applicant must satisfy the other requirements of this Rule. If the applicant fails to satisfy the requirements of this Rule, then the Court may deny such applicant admission to practice before the Court.

(2) *Attorney Applicants:* An applicant who is an attorney at law must, as a condition of being admitted to practice, file with the Admissions Clerk at the address listed in Rule 200(b) a completed application accompanied by a fee to be established by the Court, see Appendix II, and a current certificate from the Clerk of the appropriate court, showing that the applicant has been admitted to practice before and is a member in good standing of the Bar of the Supreme Court of the United States, or of the highest or appropriate court of any State or of the District of Columbia, or any commonwealth, territory, or possession of the United States. A current court certificate is one executed within 90 calendar days preceding the date of the filing of the application.

(3) *Nonattorney Applicants:* An applicant who is not an attorney at law must, as a condition of being admitted to practice, file with the Admissions Clerk at the address listed in Rule 200(b), a completed application accompanied by a fee to be established by the Court. See Appendix II. In addition, such an applicant must, as a condition of being admitted to practice, satisfy the Court, by means of a written examination given by the

Court, that the applicant possesses the requisite qualifications to provide competent representation before the Court. Written examinations for applicants who are not attorneys at law will be held no less often than every two years. By public announcement at least six months prior to the date of each examination, the Court will announce the date and the time of such examination. The Court will notify each applicant, whose application for admission is in order, of the time and the place at which the applicant is to be present for such examination, and the applicant must present that notice to the examiner as authority for taking such examination.

. . .

(c) Sponsorship: An applicant for admission by examination must be sponsored by at least two persons theretofore admitted to practice before this Court, and each sponsor must send a letter of recommendation directly to the Admissions Clerk at the address listed in Rule 200(b), where it will be treated as a confidential communication. The sponsor shall send this letter promptly after the applicant has been notified that he or she has passed the written examination required by paragraph (a)(3). The sponsor shall state fully and frankly the extent of the sponsor's acquaintance with the applicant, the sponsor's opinion of the moral character and repute of the applicant, and the sponsor's opinion of the qualifications of the applicant to practice before this Court. The Court may in its discretion accept such an applicant with less than two such sponsors.

(d) Admission: Upon the Court's approval of an application for admission in which an applicant

has subscribed to the oath or affirmation and upon an applicant's satisfaction of the other applicable requirements of this Rule, such applicant will be admitted to practice before the Court and be entitled to a certificate of admission.

D. State of California Business and Professions Code:

§6062 (a) To be certified to the Supreme Court for admission, and a license to practice law, a person who has been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency the United States may hereafter acquire shall:

. . .

(3) Have passed the general bar examination given by the examining committee. However, if that person has been an active member in good standing of the bar of the admitting sister state or United States jurisdiction, possession, or territory for at least four years immediately preceding the first day of the examination applied for, he or she may elect to take the Attorneys' Examination rather than the general bar examination.

STATEMENT OF THE CASE

In 1989, Petitioner passed a rigorous written examination and was admitted to practice law before the United States Tax Court, a federal Court of Law of national jurisdiction established by Act of Congress. After 19 years as an active member in good standing of the Tax Court bar, Petitioner submitted an application to Respondents (collectively, the "State Bar") to sit for the "Attorneys' Examination" for admission to the California Bar. As relevant here, Section §6062 of the California Business and Professions Code provides that "a person . . . admitted to practice law in a . . . United States jurisdiction" is entitled to sit for the Attorneys' Examination.

The State Bar nonetheless refused Petitioner's application, on the sole ground that "[y]ou are not an attorney." The State Bar's determination was squarely contrary to the Supremacy Clause of the federal Constitution. *Sperry v. Florida*, 373 U.S. 379 (1963).

Facts [1]

The United States Tax Court is a "Court of Law" of national jurisdiction established by Congress under Article I of the Constitution of the United States. 26 USC §§ 7441, 7442. *Freytag v. Commissioner*, 501 U.S. 868, 888 (1991). Petitioner was admitted to practice as a member of the bar of the United States Tax Court in 1989 and since then has continuously been a member in good standing of that bar.

On February 7, 2008, Petitioner submitted to the State Bar's Committee of Bar Examiners an applica-

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[1] The statement of facts in this section is taken primarily from Petitioner's petition to the California Supreme Court in this case. Respondents did not contest any facts.

tion (Appendix B pp. 2a-10a) to sit for the "Attorneys' Examination" as authorized by California Business and Professions Code §6062(a)(3).

On June 28, 2008, Petitioner's application was reviewed by the Committee of Bar Examiners. In a letter to Petitioner dated July 1, 2008 (Appendix D p. 13a), the Committee of Bar Examiners wrote:

> Your petition requesting permission to register to take the California Bar Examination as an attorney was considered by the Committee of Bar Examiners (Committee) during its meeting on June 28, 2008.
>
> The Committee denied your petition. While you indicate you are licensed to appear before the U.S. Tax Court as a non-attorney practitioner, you are not an attorney.

Petitioner requested from the Committee of Bar Examiners any minutes, memoranda, and other documentation upon which it had relied in support of its decision. By letter dated August 1, 2008 (Appendix E pp. 14a-15a), the Committee informed Petitioner that his administrative remedies had been exhausted, that his recourse was to the California Supreme Court, and that the documentation he had requested was confidential and would not be disclosed.

For applicants who are not already attorneys, the Tax Court requires passage of a bar examination, generally administered every two years. The general subject areas examined are:

A. Tax Court Rules of Practice and Procedure (25%);

B. Federal taxation (40%);

C. Federal Rules of Evidence (25%); and

D. Legal ethics, including the ABA Model Rules of Professional Conduct (10%).[2]

Applicants who pass the examination, and satisfy other requirements, are admitted to the bar of the Court and are bound by the Model Rules of Professional Conduct of the American Bar Association. The Tax Court does not distinguish between persons who are admitted to practice before it who are attorneys before they are admitted and persons who become attorneys by being admitted.[3]

The Tax Court bar examination is very difficult. From 1976 through 1979, 13 of 173 applicants (7.5%) passed the examination.[4] From 1992 through 2004, 76 of 756 applicants (10.05%) passed.[5] From 1942, when admission by examination began, through 2004, 241 individuals have been admitted to practice before the Tax Court by virtue of passing this examination.[6]

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[2] *See* United States Tax Court Press Release dated April 27, 2000, available electronically from Lexis/Nexis at 2000 TNT 84-70.

[3] It is a matter of public record that the Tax Court documents all admissions by issuing the same form of certificate: "[Name of Attorney] of [State] having fulfilled the requirements of this Court, having taken the oath and being duly qualified has been admitted to practice before the United States Tax Court." (Petitioner's certificate is attached as Appendix A, p. 1a.)

[4] Bittker, 4 *Federal Taxation of Income, Estates, and Gifts* 115-9 (WG&L, 1st ed., 1981). The Tax Court itself does not release pass/fail numbers. The statistics in this paragraph were presented in Petitioner's petition to the California Supreme Court. The State Bar did not object.

[5] Gregory, "The Tax Court Exam," EAJournal, pp. 20-23 nn. 7,8 (May-June 2007).

[6] Gregory, "The Tax Court Exam," *id.* at n. 5.

By contrast, between 28.3% and 78.2% of applicants passed the California Bar examination from 1989 to 2008.[7]

Federal taxation is in fact catholic in the degree of expertise it requires, including expertise in disparate topics of state law:

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. [*Morgan v. Commissioner*, 309 U.S. 78, 81 (1940).]

The federal income tax consequence of virtually every transaction or other event or activity that produces an item of income, deduction, or credit, depends to some degree upon the law of the state or states in which the transaction, event, or activity occurs.

Examples of California law interpreted by the Tax Court in its decisions include:

- Illegality of rebates under California Business and Professions Code §§24756, 24862, 25503, and 25600. *Max Sobel Wholesale Liquors v. Commissioner*, 69 T.C. 477 (1977).
- Susceptibility under California law of community assets to separate tax liabilities. *Ordlock v. Commissioner*, 126 T.C. 47, 58 (2006).
- California law governing public benefit corporations. *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner*, 128 T.C. 173 (2007), citing California Corporations Code §§ 5110 – 6910, *Knapp v. Palisades*

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[7] State Bar website, www.calbar.ca.gov, links to "Bar Exam," "Bar Exam Statistics," "Attorney's Examination Pass Rate Summary (1989-2008)."

Charter High School, 146 Cal.App.4th 708 (2007), the California Compassionate Use Act of 1996 (California Health & Safety Code §11362.5), and *People v. Mower*, 28 Cal.4th 457 (2002).

- Status of taxpayer as a holder in due course under California Commercial Code §3203. *Kadillac v. Commissioner*, 127 T.C. 184, 195 (2006).
- Powers of appointment, disclaimers, and mergers of interests under California law. *Estate of Engelman v. Commissioner*, 121 T.C. 54 (2003), citing and discussing, *inter alia*, California Probate Code §§ 282, 285, 695, 15209, *Nellis v. Rickard*, 133 Cal. 617 (1901), *Ammco Ornamental Iron, Inc. v. Wing*, 26 Cal.App.4th 409 (1994).
- California Uniform Fraudulent Transfer Act (California Civil Code § 3439.12). *Bresson v. Commissioner*, 111 T.C. 172, 180 (1998).
- Joint tenancy of real property under California law. *Estate of Young v. Commissioner*, 110 T.C. 297 (1998), citing and discussing, *inter alia*, California Civil Code §§ 683, 687, 5104, 5110 and 5194, California Family Code §§ 850, 852, *Sears v. Rule*, 27 Cal.2d 131 (1945), *Tomaier v. Tomaier*, 23 Cal.2d 754 (1944), *In re Watkins Estate*, 16 Cal.2d 793 (1940), *Siberell v. Siberell*, 214 Cal. 767 (1932), *Orr v. Peterson*, 28 Cal.App.4th 1742 (1994), *Bolton v. MacDonald*, 51 Cal.3d 262 (1990), *Weaver v. Weaver*, 224 Cal.App.3d 478 (1990), and several other California appellate decisions.

- Fiduciary duty of directors and controlling shareholders to corporation and minority shareholders: Proceeds of stock sale by directors belonged, under facts of case, to corporation. *Cardinal Corp. v. Commissioner*, 52 T.C. 119, 127-28 (1969) ("It is the law of Kentucky that directors and dominant or controlling shareholders, or groups of stockholders, are fiduciaries . . . and that such fiduciaries have an inherent obligation not to use their position to advance their own interest . . .") (citations omitted; Kentucky law on this point is essentially identical to *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969)).

The Tax Court has based decisions in whole or part upon consideration of provisions of 21 of California's 29 Codes of laws. The only California Codes that have not figured in at least one Tax Court decision are: Fish and Game, Food and Agriculture, Harbors and Navigation, Military and Veterans, Public Contracts, Public Resources, Streets and Highways, and Water.[8]

The Tax Court has in fact decided cases under or by reference to the laws of each of the 50 states, the District of Columbia, and by virtue of the many bilateral tax treaties to which the United States is a party, the internal laws of other nations.

Practice before the Tax Court thus requires a practitioner to recognize issues arising under the laws of California, all other States, and many other nations.

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[8] However, the Public Resources Code entered into the findings of fact in *Belridge Oil Corp. v. Commissioner*, 22 T.C. 1044, 1049 (1957), and the Water Code in *Packard v. Commissioner*, T.C. Memo 1983-681, 47 T.C.M. (CCH) 302.

By admitting Petitioner to practice before it, the Tax Court affirmed that it was satisfied as to his ability to recognize such issues, research and analyze them, and competently argue his analysis and conclusions to that Court.[9]

Moreover, Petitioner has personally appeared as counsel of record in the trial of a case before the Tax Court (*Charles Schwab Corp. v. Commissioner*, 122 T.C. 191 (2004), *decision modified in part upon reconsideration*, 123 T.C. 306 (2004)), including numerous hearings and a court-supervised attempt to resolve that case by mediation.

Federal Question Raised Below

In his petition to the California Supreme Court for review of the decision of Respondent Committee of Bar Examiners, Appendix F, p. 24a, Petitioner stated:

> I was admitted to practice as a member of the bar of the United States Tax Court in 1989 and have continuously been a member in good standing of that bar since then. The United States Tax Court is a court of national original jurisdiction established by Congress under Article I of the Constitution of the United States. 26 USC §§ 7441, 7442.[1]

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[1] Section 7441 specifically provides that the Tax Court is a court of record under article I of the

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[9] To be admitted to practice before the Tax Court, by examination, Rule 200(a)(3) of the Tax Court Rules of Practice and Procedure requires that an applicant, by passing the examination, "satisfy the Court . . . that the applicant possesses the requisite qualifications to provide competent representation before the Court." By admitting Petitioner to practice before it, the Tax Court thus declared itself satisfied as to Petitioner's competence.

> Constitution. Section 7441 was last amended in 1969 with "Congress' principal purpose ... to recognize the status of the tribunal as a judicial body" (*see* ¶2.01, Kafka & Cavanagh, Litigation of Federal Civil Tax Controversies (WG&L) citing *Burns, Stix Friedman & Co. v. Commissioner*, 57 TC 392, 395 (1971)). *See also, First Western Govt. Securities v. Commissioner*, 94 TC 549 (1990) which notes that the Tax Court is a "court of law" because it is a duly constituted tribunal administering laws of the United States.

In his Reply brief, Appendix H, at p. 39a, Petitioner reiterated that

> [i]t is clear that I *am* an attorney *because* I am admitted to practice in the United States Tax Court, a United States jurisdiction. [Emphasis in original.]

Petitioner further noted, *id.*, fn. 1, that

> Respondents quite properly do not contest that the United States Tax Court is a "United States jurisdiction," that I am admitted to practice before it, or that I have been a member in good standing of the bar of that jurisdiction for the requisite period.

In his Petition for Rehearing, Appendix J, pp. 44a-45a, Petitioner stated:

> My admission to practice as a member of the bar of the United States Tax Court was a federal determination.[1] The California statute (Section 6062 of the Business and Professional Code) recognizes federal classifications stating that to be certified for admission one needs to be "a person ... admitted to practice in a ... United

> States jurisdiction". As I am a "person" so qualified I should be certified for admission. By refusing to recognize my federal classification and the effect of the state statute the Committee of Bar Examiners and the California Supreme Court are denying me my rights to equal protection under the law. Furthermore, in this matter the California Supreme Court is a court of original jurisdiction and by refusing to hear my case I am being denied my right to due process.

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[1] The United States Tax Court is a court of national original jurisdiction established by Congress under Article I of the Constitution of the United States. 26 USC §§ 7441 and 7442.

Article VI, Clause 2 of the Constitution of the United States is both a statement of the supremacy of federal law *and* the imposition of a duty to respect that supremacy upon individuals who serve as State Judges:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Emphasis supplied.]

The justices of the California Supreme Court who considered Petitioner's petition for review of the State Bar's decision denying his application to sit for the Attorneys' Examination – were thus obligated by the federal Constitution to respect Petitioner's rights

under California law deriving from his admission to practice law before a federal tribunal.[10]

To raise the issue in the California Supreme Court, it was therefore sufficient that Petitioner asserted his rights as a member of the bar of the United States Tax Court, a federal entity created by Act of Congress.

> The supremacy clause of the Constitution requires state judges to discern and apply federal law where it is controlling. Appellants ask us in essence to presume they will not do so unless a federal court tells them to. This we cannot do.

Confederated Tribes et al., v. Superior Court, et al., 945 F.2d 1138, 1141 (9th Cir. 1991); citations omitted.

Petitioner's assertion of his rights under the Supremacy Clause was thus properly raised in the California Supreme Court.

REASONS FOR GRANTING WRIT

This case involves an important Constitutional issue regarding federal supremacy under Article VI, Clause 2 of the Constitution. The State Bar ignored Petitioner's federally assured rights and thereby deprived him of his Constitutionally protected privilege of pursuing a chosen profession.[11]

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[10] Article 20, Section 3 of the Constitution of the State of California requires each member of the State judiciary to take a personal oath to, in part, "support and defend the Constitution of the United States."

[11] "We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice

On the authority of *Sperry v. Florida*,[12] discussed below, and the strength of his admission to practice before the United States Tax Court, it appears clear that Petitioner could hold himself out as a federal tax attorney and be entitled to give advice upon not only federal tax issues, but also upon a broad swath of California state law issues that could potentially affect federal tax consequences. *Cf. State Bar of Michigan v. Cramer*, 399 Mich. 116, 151 n. 21, 249 N.W.2d 1, 17 (1976). By this Petition, however, Petitioner is seeking only to vindicate the right his federal license gives him under California law to sit for and try to pass the Attorneys' Examination for admission to the California Bar. The interests of that Bar are adequately protected by the legendary difficulty of that examination. If this Petition is granted, this Court upholds Petitioner's right to sit for the Attorneys' Examination, and Petitioner does not pass that Examination, he will suffer a degree of social embarrassment. If he passes, he will have earned the license to practice law in California.

A. The United States Tax Court, a Federal Court of Law, Has Without Qualification Admitted Petitioner To Practice Before It

This Court has squarely recognized the United States Tax Court as a federal "Court of Law" that exercises the judicial power of the United States. *Freytag v. Commissioner*, 501 U.S. 868, 888 (1991).

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of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 n.5 (1957). "This Court has recognized the privilege of practicing law as a 'liberty' protected by the Fourteenth Amendment." *Leis v. Flynt*, 439 U.S. 438, 453 n.17 (1979).

[12] *Supra*, 373 U.S. 379 (1963).

The Tax Court is authorized by Act of Congress to prescribe its own rules of practice and procedure. 26 U.S.C. §7453. Pursuant to that authority, the Tax Court has prescribed standards for admitting persons to practice before it. Tax Court Rule 200. The Tax Court allows two paths to admission to practice. First, a person who has been admitted to the bar of the highest court of a State, Territory, or the District of Columbia is eligible, upon application to be admitted without additional qualification to practice before the Tax Court. Secondly, persons, like Petitioner who have not been admitted to practice in such other jurisdictions are admitted to practice before the Tax Court upon satisfactory completion of a rigorous written examination.

Once admitted, applicants who have passed the examination have the same rights, privileges, and responsibilities as attorneys admitted from other jurisdictions. By admitting an applicant by the written bar examination, the Tax Court makes a determination that the applicant practices on a par with all other persons practicing before it.

B. California Law and the Supremacy Clause Obligate the State Bar To Give Effect to Petitioner's Federally Determined Status as an Attorney

Section 6062 of the California Business and Professions Code establishes that a "person" who has been "admitted to practice law" in "a United States jurisdiction" is entitled to sit for the "Attorneys' Examination:"

> (a) To be certified to the Supreme Court for admission, and a license to practice law, a person who has been admitted to practice law in a sister

> state, United States jurisdiction, possession, territory, or dependency the United States may hereafter acquire shall:
>
> ...
>
> (3) Have passed the general bar examination given by the examining committee. However, if that person has been an active member in good standing of the bar of the admitting sister state or United States jurisdiction, possession, or territory for at least four years immediately preceding the first day of the examination applied for, he or she may elect to take the Attorneys' Examination rather than the general bar examination.

The statute does not set forth a separate definition of "Attorney" for this purpose. None is needed, however, as it is clear that for purposes of the "Attorneys' Examination," an "Attorney" is a "person" who has been "an active member in good standing of the bar of the admitting sister state or United States jurisdiction, possession, or territory for at least four years."[13]

The State Bar's sole reason for denying Petitioner's application to take the Attorneys' Examination was its erroneous determination that "you [Petitioner] are not an attorney."

Given that Petitioner is clearly a "a person who has been admitted to practice law in a . . . United States jurisdiction" as set forth in the California Business

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[13] Common parlance yields the same result. Random House Webster's College Dictionary (1999) defines an "attorney at law" as one who, like Petitioner, is an "officer of the court authorized to appear before it as a representative of a party to a legal controversy."

and Professions Code, *supra*, the California Bar's action can only have been based in some manner upon a derogation of the federal status, dignity, and standards of the United States Tax Court.

Under the Supremacy Clause, however, the State Bar is bound by the Tax Court's determination admitting Petitioner to its bar. *Sperry v. Florida*, *supra*, 373 U.S. 379 (1963).

Sperry involved a nonattorney practitioner admitted to practice, pursuant to federal law, before the United States Patent Office. The State of Florida found that Sperry's conduct in such practice constituted the practice of law in Florida without a Florida license to do so and enjoined Sperry from continuing his practice. This Court agreed with Florida's finding that Sperry was engaged in the practice of law, 373 U.S. at 383, but in a holding directly applicable to the present case, found that Florida could not disregard the effect of Sperry's federal license:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress." *Pennsylvania* v. *Wheeling & B. Bridge Co.*, 13 How. 518, 566. [373 U.S. at 385; fns omitted.]

In the proceedings below, the State Bar sought to "hinder [and] obstruct the free use of a license granted under an act of Congress," 373 U.S. at 385,

by denying Petitioner the right clearly deriving from his federal license to sit for the California Attorneys' Examination.[14] There appears to be no "valid excuse" for those actions.[15, 16]

CONCLUSION

The California Bar violated the Supremacy Clause and California statute by not allowing Petitioner to sit for the Attorneys' Examination. In consequence, Petitioner respectfully asks that this Court grant this Petition.

Respectfully submitted,

GLENN A. SMITH
Counsel of Record
459 Hamilton Avenue
Palo Alto, CA 94301
(650) 473-1000

Counsel for Petitioner

December 29, 2008

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[14] *Cf. Sperry, supra.* 373 U.S. at 387 n. 8: "'The states cannot pass laws derogating from the rights of the patent attorneys as created by Congress . . .' Remarks of A.P. Kane, Attorney, Hearing on Proposed Revision of Rules of Practice in Patent Cases . . ."

[15] "A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'" [*Howlett v. Rose*, 496 U.S. 356, 369 (1990).] However, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." [*Id.* at 371.]

[16] While California "has a substantial interest in regulating the practice of law with the State" to the extent not incompatible with Petitioner's federal license, *Sperry*, 373 U.S. at 383-84, that interest would clearly be satisfied by administering the Attorneys' Examination to Petitioner.

APPENDIX

United States Tax Court

LAURENCE JAY BARDOFF

of

CALIFORNIA

having fulfilled the requirements of this Court, having taken the oath and being duly qualified has been admitted to practice before the United States Tax Court

Witness my hand Arthur L. Nims III
Chief Judge

In testimony whereof I have hereunto set my hand and affixed the seal of the Court at the City of Washington this 17TH day of MAY A.D. 1989

Charles A. Crapo
Clerk of the United States Tax Court

APPENDIX B

February 7, 2008

Office of Admissions
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Sir or Madame:

As part of my application to register with the State Bar of California and in accordance your instructions I offer below the following additional data. Also, I enclose my original application and payment.

I have been a member in good standing[1] of the United States Tax Court Bar since 1989 (Tax Court Bar No. BL0437) and served as co-counsel representing The Charles Schwab Corporation in three cases (122 T.C. No. 10; 122 T.C. 191; No. 16903-98; No. 18095-98 Mar. 9, 2004; 123 T.C. No. 18; No. 16903-98; No. 18095-98 Sep. 29, 2004 as well as a case still pending - Docket No. 9029-02).

The U.S. Tax Court is a Federal court of record established by Congress under Article I of the Constitution of the United States of America. Having been a member of this Court's bar for more than four years now qualifies me as an attorney applicant under Rule IV of The Rules Regulating Admission to Practice Law (Rule IV, Section 2)[2]. In addition I

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[1] I attach a copy of my letter requesting the Tax Court forward you a copy of my certificate of good standing and admission.

[2] In pertinent part this section provides that attorney applicants are those admitted to practice in "any United States jurisdiction" provided they are active members in good standing of that court's bar for more than four years.

have been a Certified Public Accountant (state of California No. 30409) since October 1980. Lastly, I have an undergraduate degree from the University of California at Berkeley as well as three advanced degrees including a Masters in Taxation.

I would very much appreciate it if you would give due consideration to this information as you process my application. Please contact me at (415) 776-7579 should you have any questions.

Sincerely,

Laurence J. Bardoff

THE STATE BAR OF CALIFORNIA

Applicant Name

U.S. Social Security Number: [omitted]

U.S. Social Security number Requirement

Please ensure that your U.S. Social Security Number is correct and is in the proper format (###-##-####).

Have you ever been admitted to practice law in another jurisdiction?	Yes
Last name:	Bardoff
First name:	Laurence
Middle name:	Jay
Suffix (Jr., Sr., etc.):	Click Here:

Mailing Address

It is the applicants responsibility to inform the State Bar's Office of Admissions in writing of any address change. All correspondence will be mailed to the mailing address on file.

Street:	2165 Beach Street No. 3
City:	San Francisco
State:	California
Zip code:	94123
Country:	United States of America
Int'l postal code:	_____

Contact Information

E-mail address:	lbardoff@yahoo.com
Confirm your e-mail address:	lbardoff@yahoo.com

Phone number: [omitted]
(###) ###-####

Foreign telephone number: _____

Biographical Information

Date of birth: 09/02/1953
mm/dd/yyyy

City of birth: San Francisco

State of birth: California

Country of birth: United States of America

Mother's Full Maiden Name:

First name: [omitted]

Last name: [omitted]

The following information is to be furnished by each applicant as part of the examination. The Committee of Bar Examiners is gathering this data to assist in the continuing evaluation of the examination. This information will be treated in a confidential manner and will be used only for research purposes. It will not be retained by the Committee as part of your application.

Sex: Male

Ethnicity:
American Indian or Alaskan Native
Filipino
Pacific Islander
Origins in Indian subcontinent
Asian Hispanic
Black
☑ White

Law School Education

If you obtained your legal education outside of the United States and have not been admitted to practice law, please review the California State Bar eligibility requirements.

Date law study began: 07/01/1978
mm/dd/yyyy

Please indicate below the law school you are currently attending and any previously completed law study. If you are studying through a law office or are attending a foreign law school, please select the appropriate choices in the law school list provided. If you do not have enough room to enter all of your information, please submit the additional data to the Office of Admissions in writing.

Law school name: N/A Member of US Tax Court Bar :

CEEB code: _____

City: _____

State: District of Columbia

Country: United States of America

Student ID #: BL0437

Date attended from: 03/1989 to:*_____
mm/yyyy

* if currently enrolled, indicate anticipated completion date

Graduation date or anticipated graduation date: mm/yyyy

Degree earned:** Other

** If you did not or will not earn a degree, please select "None from the list

Law school name: Click the "Find" Button to Select the School :

CEEB code:

City:

State: Click here

Country: Click here

Student ID #:

Date attended from: _____ to:* _____
mm/yyyy

If you are an attorney admitted to practice law in any United States jurisdiction, possession, territory, or dependency the United States may hereinafter acquire, you may take the General Ear Examination (3 days). You may qualify to take the Attorney's Examination (2 days) if you are an active member of any United States jurisdiction, possession, territory, or dependency the United States may hereinafter acquire for at least four years immediately preceding the first day of the administration of the California Bar Examination for which you applied.

Attorneys admitted in foreign jurisdictions must take the General Bar Examination.

If you are a suspended or disbarred attorney, please review the California State Bar eligibility requirements.

When you submit an exam application, for which exam do you plan to apply? Attorney's Exam (2 days)

U.S. Attorneys

If you have been admitted to a jurisdiction in the United States, please forward, within 5 days of filing

the registration application, a current Certificate of Good Standing and Admission (CGS) from all the jurisdictions to which you were admitted. If you are submitting the bar examination and registration simultaneously, you will only need to submit one original copy of the CGS from each jurisdiction.

Foreign Attorneys

If you have been admitted to a jurisdiction outside the United States (Foreign Attorneys), please submit within 5 days of filing this application, a Certificate of Admission from that jurisdiction. Please do not submit this application until you have the Certificate of Admission.

If you do not have enough room to enter all of your information, please submit the additional data to the Office of Admissions in writing.

Jurisdiction name:	Click here
Bar admission number:	
Jurisdiction admission date:	mm/yyyy
Jurisdiction status:	Click Here
Jurisdiction status from:	to: mm/yyyy
Jurisdiction name:	Click here
Bar admission number:	
Jurisdiction admission date:	mm/yyyy
Jurisdiction status:	Click Here

submission. The State Bar of California and Xap Corporation are not responsible for the privacy practices or content of such site. For your protection you should read and understand the privacy policy at any website you visit prior to providing personal information on that website.

☑ I certify agreement with the terms and conditions given above.

Certification

☑ I hereby certify that I have read and understand that I must comply with all requirements of the Riles Regulating Admission to practice law in California and I agree to the Committee of Bar Examiners' application policies, including the Refund of Fees/ Withdrawal policy.

Application Declaration

The person named as the applicant in the foregoing application and questionnaire declares:

I have carefully read the questions in the foregoing application and have answered them truthfully, fully, and completely, without mental reservations of any kind.

I hereby authorize educational or other institutions or agencies to release to the Committee of Bar Examiners (Committee) any information, files, transcripts or records requested by the Committee in connection with the processing of this application.

I hereby certify that I have read and understand that I must comply with all requirements of the Rules Regulating Admission to Practice Law in California and I agree to the Committee of Bar Examiners' application policies, including the Refund of Fees/ Withdrawal policy.

I declare under penalty of perjury under the laws of the State of California that my answers to the foregoing questionnaire and all statements by me herein are true and correct.

Note: This application is not an application for taking the California Bar Examination or First Year Law Student's Examination and not an Application for Moral Character Determination.

☑ I certify agreement with the terms and conditions given above.

Credit Card/Liability Agreement

The State Bar of California is not responsible or in any way liable for any computer hardware or software malfunction which may affect the application process. You assume all responsibility and risk for the use of this system and the Internet generally. The State Bar of California expressly disclaims any warranty that use of this system or the Internet generally will be uninterruptible or error free or that any information, software or other material accessible from the system is free of viruses or other harmful components. The State Bar of California shall not be liable for any direct, indirect, punitive, incidental, special or consequential damages arising out of or in any way connected with the use of this system or with the delay or inability to use it (or any linked sites), or for any information obtained through this system, or otherwise arising out of the use of this system, the Internet generally or on any other basis.

A Mastercard or Visa is required for submission of this application. If your credit card transaction is denied, you will not be able to submit your application until you enter another Mastercard or Visa number and try resubmitting your application.

Please be aware when you submit your credit card payment, your personal information and identifying information will be sent to VeriSign for the purpose of processing your application

APPENDIX C

CALIFORNIA APPELLATE COURTS
SUPREME COURT

Case Number: S166341

BARDOFF

v.

STATE BAR

DOCKET ENTRIES

Date	Description	Notes
08/29/2008	Petition for writ of review filed (SB-other)	Laurence J., Bardoff, Petitioner in pro per.
09/09/2008	Response by State Bar filed	State Bar of California and the Board of Governors of the State Bar, respondents, by Richard J. Zanassi, counsel
09/15/2008	Reply to State Bar response filed	Laurence J. Bardoff, petitioner in pro per
09/17/2008	Received:	from ptnr. Word Count Certif.

Date	Description	Notes
10/01/2008	Petition for writ of review denied	Kennard, J., was absent and did not participate
10/16/2008	Filed:	Petition for Rehearing Laurence J. Bardoff, petitioner in pro per
10/17/2008	Petition stricken (case closed - civil)	The petition for rehearing in the above-entitled matter, filed on October 16, 2008, is hereby stricken. (See Cal. Rules of Court, rule 9.18(a).)

APPENDIX D

[Logo]
The Committee of Bar Examiners of
The State Bar of California
Office of Admissions

180 Howard Street
San Francisco, California 94105-1639
(415) 538-2303

July 1, 2008

Laurence J. Bardoff
2165 Beach Street, # 3
San Francisco, CA 94123

Re: Your letter of May 19, 2008

Dear Mr. Bardoff:

Your petition requesting permission to register to take the California Bar Examination as an attorney was considered by the Committee of Bar Examiners (Committee) during its meeting on June 28, 2008.

The Committee denied your petition. While you indicate you are licensed to appear before the U.S. Tax Court as a non-attorney practitioner, you are not an attorney.

Sincerely yours,

/s/ George A. Riemer
George A. Riemer
Director for Educational Standards

cc: John Rodriguez, Director for
Operations and Management

APPENDIX E

[Logo]
The Committee of Bar Examiners of
The State Bar of California
Office of Admissions

180 Howard Street
San Francisco, California 94105-1639
(415) 538-2303

August 1, 2008

Laurence J. Bardoff
2165 Beach Street, # 3
San Francisco, CA 94123

Re: Your letter of July 28, 2008

Dear Mr. Bardoff:

This letter responds to your July 28, 2008 letter.

Yes, you have exhausted your remedies before the Committee of Bar Examiners (Committee). The Committee did not consider your admission as a non-attorney practitioner before the U.S. Tax Court to qualify you as an attorney applicant under Rule IV of the Rules Regulating Admission to Practice Law in California. It is up to you whether to petition the California Supreme Court for relief.

The public minutes of the Committee's June 28, 2008 are not yet available. Consideration of your petition, however, would have occurred during the closed portion of the meeting. Staff's memorandum to the Committee concerning your petition is confidential.

I am returning the State Bar's refund check. Not cashing it is up to you.

Sincerely yours,

/s/ George A. Riemer
George A. Riemer
Director for Educational Standards

Enclosure (Check No. 01651543)

cc: John Rodriguez, Director for
Operations and Management

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[Received Aug 29, 2008]

LAURENCE J. BARDOFF,
Petitioner

v.

STATE BAR OF CALIFORNIA AND THE BOARD OF
GOVENORS OF THE STATE BAR OF CALIFORNIA,
Respondents

Original Proceeding in the Supreme Court of the
State of California after a Decision of the
State Bar of California

LAURENCE J. BARDOFF, *Pro Se*

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Validation and Proof of Service	13
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TABLE OF EXHIBITS

Exhibit A	July 1, 2008 letter from The Committee of Bar Examiners of The State Bar of California denying petition to register to take the Bar Examination.
Exhibit B	August 1, 2008 letter from The Committee of Bar Examiners of The State Bar of California confirming that petitioner exhausted administrative remedies and denying access to any documentation related to application
Exhibit C	Cover letter dated February 7, 2008 and application to register with the State Bar of California.
Exhibit D	Documentation from the United States Tax Court certifying petitioners good standing since May 17, 1989.
Exhibit E	March 7, 2008 letter from The Committee of Bar Examiners of The State Bar of California stating they are unable to process petitioners registration application.
Exhibit F	March 13, 2008 letter from petitioner responding to Exhibit E.
Exhibit G	March 21, 2008 letter from The Committee of Bar Examiners of The State Bar of California responding to Exhibit E.
Exhibit H	March 24, 2008 letter from petitioner returning check.
Exhibit I	March 25, 2008 letter from petitioner requesting documentation.

Exhibit J	April 1, 2008 letter from The Committee of Bar Examiners of The State Bar of California responding to Exhibits H and I.
Exhibit K	April 21, 2008 letter from petitioner responding to Exhibit J.
Exhibit L	April 24, 2008 letter from The Committee of Bar Examiners of The State Bar of California responding to Exhibit K.
Exhibit M	May 19, 2008 letter from petitioner responding to Exhibit L and requesting Committee Review.
Exhibit N	May 20, 2008 letter from The Committee of Bar Examiners of The State Bar of California responding to Exhibit M.
Exhibit 0	July 28, 2008 letter from petitioner responding to Exhibit A.
Exhibit P	Documentation on Tax Court Exam—Memorandum from Tax Court on Exam; page 115-9 of Bittker & Lokken's Federal Taxation of Income, Estates, and Gifts (WG&L); Article from May-June 2007 EAJournal.
Exhibit Q	State Bar of California Attorney's Examination Pass Rate Summary.

TABLE OF AUTHORITIES

RULES

Rules Regulating Admission to Practice Law in California Rule IV. Attorney Applicants Section 2.

Rule VII. Educational Requirements Section 2(b)(2).

ABA RULES

Rule 1.8 of the ABA Model Rules of Professional Conduct.

STATE STATUTES

Section 6025 of the State Bar Act.

California Business and Professions Code §§24756, 24862, 25503, and 25600.

California Corporations Code §§ 5110-6910.

California Compassionate Use Act of 1996 (California Health & Safety Code §11362.5.

California Commercial Code §3203.

California Probate Code §§ 282, 285, 695, 15209.

California Uniform Fraudulent Transfer Act, California Civil Code § 3439.12.

California Civil Code §§5194, 683, 687, 5104, 5110.

California Family Code §§ 850, 852.

STATE CASES

Knapp v. Palisades Charter High School, 146 Cal.App.4th 708 (2007).

People v. Mower, 28 Cal. 4th 457 (2002).

Nellis v. Rickard, 133 Cal. 617 (1901).

Ammco Ornamental Iron, Inc. v. Wing, 26 Cal.App.4th 409 (1994).

Sandrini v. Ambrosetti, 111 Cal.App. 439 (1952).

TABLE OF AUTHORITIES—Continued

Schindler v. Schindler, 126 Cal.App.297 (1954).
Siberell v. Siberell, 214 Cal. 767 (1932).
Sears v. Rule, 27 Ca1.2d 131 (1945).
Tomaier v. Tomaier, 23 Ca1.2d 754 (1944).
Bernatas v. Honnert, 162 Cal.App.2d 693 (1958).
Edwards v. Dieterich, 118 Cal.App.2d 254 (1953).
Watkins Estate, 16 Ca1.2d 793 (1940).
Tompkins v. Bishop, 94 Cal.App2d 546 (1949).
On v. Peterson, 28 Cal.App.4th 1742 (1994).
Bolton v. MacDonald, 51 Cal.3d 262 (1990).
Weaver v. Weaver, 224 Cal.App.3d 478 (1990).
Jones v. H. F. Ahmanson & Co., 1 Ca1.3d 93 (1969).

FEDERAL STATUTES

26 USC §7441.
26 USC §7442.

FEDERAL CASES

Burns, Stix Friedman & Co. v. Commissioner, 57 TC 392, 395 (1971).
First Western Govt. Securities v. Commissioner, 94 TC 549 (1990).
Morgan v. Commissioner, 309 U.S. 78, 81 (1940).
Max Sobel Wholesale Liquors v. Commissioner, 69 T.C. 477 (1977).
Ordlock v. Commissioner, *126* T.C. 47, 58 (2006).
Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner, 128 T.C. 173, (2007).
Kadillac v. Commissioner, 127 T.C. 184, 195 (2006).

TABLE OF AUTHORITIES—Continued

Estate of Engelman v. Commissioner, 121 T.C. 54 (2003).

Bresson v. Commissioner, 111 T.C. 172, 180 (1998).

Estate of Young v. Commissioner, 110 T.C. 297 (1998).

Cardinal Corp. v. Commissioner, 52 T.C. 119, 127-28 (1969).

Charles Schwab Corp. v. Commissioner, 122 T.C. 191 (2004), 123 T.C. 306 (2004).

Polakis v. Commissioner, 91 T.C. 660, 664 n5 (1988).

Belridge Oil Corp. v. Commissioner, 22 T.C. 1044, 1049 (1957).

Packard v. Commissioner, T.C. Memo 1983-681, 47 T.C.M. (C.C.H.) 302.

TREATISES

Kafka & Cavanagh: Litigation of Federal Civil Tax Controversies (WG&L)

Bittker & Lokken: Federal Taxation of Income (WG&L).

ARTICLES

"*The Tax Court Exam*" by Sherrill L. Gregory appearing in the May-June 2007 issue of EAJournal.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LAURENCE J. BARDOFF,
Petitioner

v.

STATE BAR OF CALIFORNIA AND THE BOARD OF GOVENORS OF THE STATE BAR OF CALIFORNIA,
Respondents

On Petition for Review of Denial of Application for Registration for Examination by Committee of Bar Examiners

---

PETITION FOR REVIEW

Laurence J. Bardoff
2021 Webster Street
San Francisco, CA 94115
(415) 776-7579

Pro Se

PETITION

Pursuant to Rule 9.13(d) of the California Rules of Court, I respectfully request review of the decision on July 1, 2008 of the Committee of Bar Examiners of the Board of Governors of The State Bar of California denying my application to register for the California Bar Examination.

JURISDICTION and TIMELINESS

This Court has jurisdiction under Rule 9.13(d) of the California Rules of Court. This Petition is timely because it is filed within 60 days of the action of the Committee of Bar Examiners denying my application. Because this matter does not involve a disciplinary or reinstatement proceeding, the State Bar Court has no jurisdiction over it, and petition directly to this Court is appropriate.

RECORD

My application to and correspondence with the Committee of Bar Examiners is submitted with this Petition. The Committee of Bar Examiners has refused my request for transcripts and other documentation of its proceedings in this matter, and in consequence I cannot submit them to this Court.

QUESTION PRESENTED

Is one admitted to practice before the United States Tax Court as a result of passing that Court's bar examination "admitted to practice" in a "United States jurisdiction" as provided in Rule IV, Section 2 of the Rules Regulating Admission to Practice Law in California?

STATEMENT OF FACTS

I was admitted to practice as a member of the bar of the United States Tax Court in 1989 and have con-

tinuously been a member in good standing of that bar since then. The United States Tax Court is a court of national original jurisdiction established by Congress under Article I of the Constitution of the United States. 26 USC §§ 7441, 7442.[1]

In a closed meeting, my application was reviewed by the Committee of Bar Examiners of the State Bar of California. In a letter to me dated July 1, 2008 (Exhibit A) the Committee of Bar Examiners wrote:

> Your petition requesting permission to register to take the California Bar Examination as an attorney was considered by the Committee of Bar Examiners (Committee) during its meeting on June 28, 2008.
>
> The Committee denied your petition. While you indicate you are licensed to appear before the U.S. Tax Court as a non-attorney practitioner, you are not an attorney.

In response to my subsequent queries the Committee, in a letter dated August 1, 2008 (Exhibit B), informed me that my administrative remedies had been exhausted and that my recourse was now to the California Supreme Court. Further, in that letter the Committee stated that the documentation I re-

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[1] Section 7441 specifically provides that the Tax Court is a court of record under article I of the Constitution. Section 7441 was last amended in 1969 with "Congress' principal purpose . . . to recognize the status of the tribunal as a judicial body" (*see* 2.01, Kafka & Cavanagh, Litigation of Federal Civil Tax Controversies (WG&L) citing *Burns, Stix Friedman & Co. v. Commissioner*, 57 TC 392, 395 (1971)). *See also First Western Govt. Securities v. Commissioner*, 94 TC 549 (1990) which notes that the Tax Court is a "court of law" because it is a duly constituted tribunal administering laws of the United States.

quested (i.e. minutes, memorandums or any other documentation discussing my application) was confidential and they could not provide me copies.

Accordingly, and in compliance with Rule 9.13(e)(2) of Title 9 of the California Rules of Court, my administrative remedies have been exhausted. Further, I cannot provide transcripts or documents explaining the position of the State Bar of California as none were provided to me. I do however, as required by Rule 9.13(e)(2) of the California Rules of Court, include as part of my exhibits legible copies of all communications I have had with the State Bar of California regarding my application (*see* Exhibits A-O).

The Committee of Bar Examiners misunderstood the nature and dignity of the United States Tax Court and the severity of the standards that must be satisfied for admission to the bar of that Court.

For applicants who are not already attorneys, the Tax Court requires passage of a bar examination, generally administered every two years. The general subject areas (*see* Exhibit P) examined are:

A. Tax Court Rules of Practice and Procedure (25%);

B. Federal taxation (40%);

C. Federal Rules of Evidence (25%); and

D. Legal ethics, including the ABA Model Rules of Professional Conduct (10%).

Applicants who pass the examination and satisfy the other requirements for admission, are admitted to the bar of the Court. Moreover, they are bound to the Model Rules of Professional Conduct of the American Bar Association—which by their specific

and repeated terms, apply to "lawyer[s]."[2] By the very terms under which I was admitted to practice before the United States Tax Court, I am an attorney, a lawyer, a member of the bar of a court of national jurisdiction.

The written reaction of the Committee of Bar Examiners can be read as reflecting a degree of parochialism regarding the bar examination of the United States Tax Court, the Tax Court itself, and the breadth of knowledge necessary to practice law in the area of federal taxation.

The Tax Court bar examination is not trivial as documented by its extraordinarily low pass rate. From its inception in 1942 through 2004 only 241 individuals have been admitted to practice before the Tax Court by virtue of having passed this examination.[3] A past volume of Bittker & Lokken's highly regarded tax treatise Federal Taxation of Income, Estates, and Gifts (WG&L)—Volume IV page 115-9 (pertinent section attached—*see* Exhibit P) reported that "[d]uring the period 1976-1979, however, only thirteen applicants (out of 173) were admitted to

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[2] By way of a randomly chosen but highly characteristic example, Rule 1.8 of the ABA Rules provides in relevant part:

> "(a) A lawyer shall not enter into a business a business transaction with a client . . . (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client . . . (c) A lawyer shall not solicit any substantial gift from a client . . ." (Emphasis added.)

[3] *See* Footnotes 7 and 8 of "The Tax Court Exam" by Sherrill L. Gregory appearing in the May-June 2007 issue of EA Journal (Exhibit P). Note that footnote 8 of that article states of the 7,342 non-attorney practitioners as of 2004, 7,101 were grandfathered in 1942. Thus, I am one of only 241 (7,342—7,101) that have passed the examination through 2004.

practice by examination" (a pass rate of 7.5%). Further, a recent article (Exhibit P) noted that the average pass rate was between 5.6% and 16.5% for the period from 1992 through 2004 as follows:

> In 1992, 8 out of 76 that took the exam passed (10.5%).
>
> In 1994, 13 out of 127 that took the exam passed (10.2%).
>
> In 1996, 14 out of 175 that took the exam passed (8.0%).
>
> In 1998, 13 out of 156 that took the exam passed (8.3%).
>
> In 2000, 17 out of 103 that took the exam passed (16.5%).
>
> In 2002, 7 out of 47 that took the exam passed (14.9%).
>
> In 2004, 4 out of 72 that took the exam passed (5.6%).

In summary, the pass rate on the Tax Court's bar examination is much less than the 28.3% to 78.2% that passed the California Bar examination from 1989 to 2008 (*see* Exhibit Q).

Federal taxation may have seemed arcane to the Committee of Bar Examiners, but it is in fact catholic in the degree of expertise it requires, including specific expertise in disparate topics of state law.

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. [*Morgan v. Commissioner*, 309 U.S. 78, 81 (1940).]

It follows that the tax consequence of virtually every transaction or other event or activity that pro-

duces an item of income, deduction, or credit, or is subject to federal excise tax (including estate, gift, firearms, alcohol, tobacco, and customs) depends to some degree upon the law of the state or states in which the transaction, event, or activity occurs.

Examples, by no means exhaustive, include:

- Illegality of rebates under California Business and Professions Code §§24756, 24862, 25503, and 25600. *Max Sobel Wholesale Liquors v. Commissioner*, 69 T.C. 477 (1977).[4]
- Susceptibility under California law of community assets to separate tax liabilities. *Ordlock v. Commissioner*, 126 T.C. 47, 58 (2006).
- California law governing public benefit corporations. *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner*, 128 T.C. 173, (2007), citing California Corporations Code §§ 5110-6910, *Knapp v. Palisades Charter High School*, 146 Cal.App.4th 708 (2007), the California Compassionate Use Act of 1996 (California Health & Safety Code §11362.5, and *People v. Mower*, 28 Cal. 4th 457 (2002).
- Status of taxpayer as a holder in due course under California Commercial Code §3203. *Kadillac v. Commissioner*, 127 T.C. 184, 195 (2006).
- Powers of appointment, disclaimers, and mergers of interests under California law. *Estate of Engelman v. Commissioner*, 121 T.C. 54 (2003), citing and discussing, inter alia, California Probate Code §§ 282, 285, 695, 15209,

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[4] The taxpayer in this case was represented by now-District Court Judge Charles R. Breyer.

Nellis v. Rickard, 133 Cal. 617 (1901), *Ammco Ornamental Iron, Inc. v. Wing*, 26 Cal.App.4th 409 (1994).

- California Uniform Fraudulent Transfer Act, California Civil Code § 3439.12. *Bresson v. Commissioner*, 111 T.C. 172, 180 (1998).

- Joint tenancy of real property under California law. *Estate of Young v. Commissioner*, 110 T.C. 297 (1998), citing and discussing, *inter alia*, California Civil Code §§5194, 683, 687, 5104, 5110, California Family Code §§ 850, 852, *Sandrini v. Ambrosetti*, 111 Cal.App. 439 (1952), *Schindler v. Schindler*, 126 Cal.App.297 (1954), *Siberell v. Siberell*, 214 Cal. 767 (1932), *Sears v. Rule*, 27 Ca1.2d 131 (1945), *Tomaier v. Tomaier*, 23 Ca1.2d 754 (1944), *Bernatas v. Honnert*, 162 Cal.App.2d 693 (1958), *Edwards v. Dieterich*, 118 Cal.App.2d 254 (1953), *In re Watkins Estate*, 16 Cal.2d 793 (1940), *Tompkins v. Bishop*, 94 Cal.App2d 546 (1949), *Orr v. Peterson*, 28 Cal.App.4 1742 (1994), *Bolton v. MacDonald*, 51 Ca1.3d 262 (1990), *Weaver v. Weaver*, 224 Cal.App.3d 478 (1990).

- Fiduciary duty of directors and controlling shareholders to corporation and minority shareholders: Proceeds of stock sale by directors belonged, under facts of case, to corporation. *Cardinal Corp. v. Commissioner*, 52 T.C. 119, 127-28 (1969) ("It is the law of Kentucky that directors and dominant or controlling shareholders, or groups of stockholders, are fiduciaries . . . and that such fiduciaries have an inherent obligation not to use their position to advance their own interest . . .") (citations omitted; Kentucky law on this point is essen-

tially identical to *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969)).

The Tax Court has based decisions in whole or part upon consideration of provisions of 21 of California's 29 Codes of laws.[5] The only Codes that have not figured in at least one Tax Court decision are: Fish and Game, Food and Agriculture, Harbors and Navigation, Military and Veterans, Public Contracts, Public Resources, Streets and Highways, and Water.[6] The point is that to practice before the Tax Court requires a practitioner in California to be alert to issues or potential issues arising under the bulk of the laws of the State.

Moreover, the Tax Court has in fact decided cases under or by reference to the laws of each of the 50 states and the District of Columbia. I do not claim to be expert in all of those laws, or even many of them. I assert, however—and the Committee of Bar Examiners should have recognized—that the Tax Court has acknowledged my ability to recognize relevant issues arising under those laws, research and analyze them in a lawyer-like fashion, and competently argue my analysis and conclusions to that Court.

Moreover, I have personally appeared as counsel of record in the trial of a case before the Tax Court (*Charles Schwab Corp. v. Commissioner*, 122 T.C. 191 (2004), 123 T.C. 306 (2004)) and in numerous

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[5] Including the Elections Code (*Polakis v. Commissioner*, 91 T.C. 660, 664 n5 (1988)).

[6] However, the Public Resources Code entered into the findings of fact in *Belridge Oil Corp. v. Commissioner*, 22 T.C. 1044, 1049 (1957), and the Water Code in *Packard v. Commissioner*, T.C. Memo 1983-681, 47 T.C.M. (C.C.H.) 302.

hearings and a court-supervised attempted mediation of that case.

ARGUMENT

Rule IV, Section 2 of the Rules Regulating Admission to Practice Law in California reads as follows:

> An attorney applicant who has been admitted to practice in a sister state, or any United States jurisdiction, possession, territory, or dependency the United States hereafter acquires, may elect to take the Attorneys' Examination rather than the entire California Bar Examination provided that he or she has been an active member in good standing of the bar of the admitting state or jurisdiction, possession, territory or dependency for at least four years immediately preceding the first day of the administration of the California Bar Examination for which the applicant applied.

I clearly satisfy the literal requirements for application of the foregoing rule. I have been admitted to practice, by virtue of having passed a very difficult bar examination, in a national jurisdiction and have been a member in good standing of the bar of that jurisdiction for 19 years. I have appeared as counsel of record in the trial of a case before the Tax Court and numerous hearings, administrative proceedings, and a court-supervised mediation attempt involved in that case.

The real question is therefore whether there is any substantive reason to *deny* me the benefit of Rule IV, Section 2. The only potential justification for the Committee of Bar Examiners' otherwise arbitrary denial of my application appears to be that I have not attended law school. In California, however, that is

not an impediment to admission to the Bar, since the rules promulgated by the Board of Governors as authorized by Section 6025 of the State Bar Act allow non-attorneys to register for the examination. Rule VII, Section 2(b)(2) and Section 2, Part IV. Moreover, I respectfully submit, the range of expertise demanded of me in California law in order to practice before the Tax Court, is at least the equal of what might be expected to be gained by one reading law under the direction of an attorney.

CONCLUSION

Based on the foregoing, I respectfully submit that the Committee of Bar Examiners erred in denying my request to take the California Bar Examination and respectfully request that this Court grant my Petition for Review and reverse the Committee's decision.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S166341

LAURENCE J. BARDOFF,
Petitioner,

v.

STATE BAR OF CALIFORNIA AND THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,
Respondents.

MEMORANDUM RESPONSE OF THE STATE BAR OF CALIFORNIA IN OPPOSITION TO PETITION FOR REVIEW

I. PRELIMINARY STATEMENT

Petitioner, Laurence J. Bardoff, herein petitions this Court for review of the Committee of Bar Examiners' decision denying his request to take the Attorney Examination.[1]

Plain and to the point — only attorneys are eligible to take the Attorney Examination and Petitioner is simply not a licensed attorney. The entire crux of Pe-

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[1] The Attorney Examination consists of the written questions and the performance tests from the California Bar Examination, but does not include the multiple choice [or Multistate Bar Examination (MBE)] portion of the test. (Rules Regulation Admission to Practice Law in California, Rule VIII, § 2(c).)

titioner's argument is that as a member of the United States Tax Court Bar he is qualified to sit for the Attorney Examination. However, Petitioner's argument fails as a matter of course since he is a *non-attorney* member of the Tax Court Bar. (*See* Petition, Exhibit D, p. 2, Certification of Standing from United States Tax Court; p. 4, United States Tax Court Application For Admission to Practice For Non-Attorneys.)

Petitioner is not qualified to take the Attorney Examination and the Committee of Bar Examiners properly rejected his application. Accordingly, Petitioner's petition for review should be denied.

II. STATEMENT OF PROCEEDING

On or about February 7, 2008, Petitioner submitted his application and payment for the Attorney Examination. As part of his application materials, he also submitted a letter to the State Bar explaining why he thought his U.S. Tax Court Bar membership qualified him to take the Attorney Examination and a copy of a letter to the U.S. Tax Court Bar, dated February 5, 2008, requesting that a certificate of standing be sent to the State Bar. (Petition, Exhibit C.) On February 12, 2008, the U.S. Tax Court sent the requested certificate of standing, as well as a copy of Petitioner's Application for Admission to Practice before the U.S. Tax Court. (Petition, Exhibit D.) Notably, the certificate of standing states that: "Laurence Jay Bardoff was duly admitted to practice before [the U.S. Tax Court], as a *non-attorney practitioner*, on May 17, 1989." (Petition, Exhibit D, p. 2 [Emphasis added].) Moreover, the Application for Admission to Practice before the U.S. Tax Court indicates that "Laurence Jay Bardoff' applied for admission as a

"*Non-Attorney*." (Petition, Exhibit D, p. 4 [Emphasis added.)

On March 7, 2008, Petitioner was informed in writing that the State Bar was unable to process his registration as an attorney applicant since Petitioner was not an attorney. (*Petition*, Exhibit E.) On March 13, 2008, Petitioner sent a follow-up letter to the State Bar reiterating his position that admission to practice before the Tax Court qualified him to take the Attorney Examination. (*Petition,* Exhibit F.) On March 21, 2008, the State Bar wrote to Petitioner pointing out that the Attorney Examination is only for attorneys and Petitioner's certificate of standing and admission application from the U.S. Tax Court showed that he was admitted as a non-attorney. (*Petition*, Exhibit G.)

An exchange of correspondence between Petitioner and the State Bar continued between March 24, 2008 and May 19, 2008—in each instance Petitioner arguing that his Tax Court membership qualified him to sit for the Attorney Examination and the State Bar countering that his Tax Court membership was as a non-attorney. (*Petition*, Exhibits H-M.) On May 20, 2008, the State Bar informed Petitioner that his application would be reviewed by the Committee of Bar Examiners at its next regularly scheduled meeting. (*Petition*, Exhibit N.) On June 28, 2008, the Committee considered Petitioner's application and denied his request to sit for the Attorney Examination. This decision was communicated to Petitioner in writing on July I, 2008. (*Petition*, Exhibit A.)

On August 29, 2008, Petitioner filed the instant petition requesting review of the Committee's decision. The State Bar herein timely files this response.

III. ARGUMENT

The Rules Regulation Admission the Practice Law in California permit attorney applicants to register and take the Attorney Examination. (Rules Regulation Admission the Practice Law, Rule IV.) Rule IV, section 2, specifically provides:

> An attorney applicant who has been admitted to practice in a sister state, or any United States jurisdiction, possession, territory, or dependency of the United States here-after acquires, may elect to take the Attorneys' Examination rather than the entire California Bar Examination provided that he or she has been an active member in good standing of the bar of the admitting state or jurisdiction, possession, territory or dependency for at least four years immediately preceding the first day of the administration of the California Bar Examination for which the applicant applied.

Petitioner focuses only on the fact that he is admitted to practice before the United States Tax Court, and fails to recognize that this rule expressly and emphatically only applies to "attorney applicants." Petitioner is not an attorney, and is therefore not qualified to sit for the Attorney Examination.

For this simple reason, the State Bar, the Committee of Bar Examiners, and the Board of Governors respectfully request that Petitioner's petition be denied.

Dated: September 9, 2008

Respectfully submitted,

MARIE M. MOFFAT
RICHARD J. ZANASSI
RACHEL S GRUNBERG

By: /s/ Richard J. Zanassi
Richard J. Zanassi

Attorneys for Respondent
The State Bar of California
and the Board of Governors
of the State Bar of California

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S166341

LAURENCE J. BARDOFF,
Petitioner,

v.

STATE BAR OF CALIFORNIA AND THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR REVIEW

Respondents entire argument is that Rule IV, Section 2 of the Rules Regulating Admission to Practice Law in California requires *both* that I be an "attorney" *and* that I be admitted to practice in a ". . . United States jurisdiction . . ." in order to take the Attorney's Examination.[1] Respondents thereby place an inappropriate and far-too-heavy burden on the word "attorney," and it strains, cracks, and breaks under that tension.[2] Under California law, it is clear

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[1] Respondents quite properly do not contest that the United States Tax Court is a "United States jurisdiction," that I am admitted to practice before it, or that I have been a member in good standing of the bar of that jurisdiction for the requisite period.

[2] T.S. Eliot, *Burnt Norton*, verse V, IL 13-17 (1935)

that I *am* an attorney *because* I am admitted to practice in the United States Tax Court, a United States jurisdiction.

Section 6062 of the Business and Professions Code, establishing by statute the pre-requisites for the Attorneys' Examination, does not speak in terms of "attorney" or non-"attorney" status, but only of "person[s]" who have been admitted to practice in other jurisdictions, including those of the United States:

> (a) To be certified to the Supreme Court for admission, and a license to practice law, a person who has been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency the United States may hereafter acquire shall:
>
> * * *
>
> (3) Have passed the general bar examination given by the examining committee. However, if that person has been an active member in good standing of the bar of the admitting sister state or United States jurisdiction, possession, or territory for at least four years immediately preceding the first day of the examination applied for, he or she may elect to take the Attorneys' Examination rather than the general bar examination. [Emphasis added.]

The terms of Section 6060 of the Business and Professions Code are the same in establishing the requirements for a "person who has not been admitted to practice law in a sister state, United States jurisdiction," etc.

Rule IV, Section 2 clearly derives from and effectuates the statutory framework of the Business and Professions Code, and in that context it is equally clear that the term "attorney" is descriptive only—it merely describes a person who has been admitted to practice in a qualifying jurisdiction and does not impose a separate substantive requirement.

Moreover, my reading of the Rule and Business and Professions Code is consistent with both common parlance and another element of California statute. Section 950 of the Evidence Code, as relevant here, defines "lawyer" to include a "person authorized . . . to practice law in any state or nation." The Merriam-Webster online dictionary similarly defines "attorney-at-law" to be "a practitioner in a court of law who is legally qualified to prosecute and defend actions in such court on the retainer of clients."

Respondent clutches at the slender reed of my admission to practice before the Tax Court as a non-attorney practitioner. This one breaks under the strain as well. I may have been a non-attorney practitioner *before* the Tax Court admitted me to its bar, but after and because of that admission, I am an attorney now (and have been since 1989). The Tax Court does not distinguish in any material or substantive way between the practitioners before it who were attorneys before they were admitted to its bar and those who were not. We are all subject to the same code of professional conduct, professional responsibilities, and rules of court.

And in any event, Respondent's argument, even if correct, would prove too much, in that it does not actually matter for purposes of this proceeding what term the Tax Court applies to me—what is important is my status under California law and the Rules of

this Court. And under those standards, I am eligible to take the Attorneys' Examination.

Dated: September 14, 2008

Respectfully submitted,

/s/ LAURENCE J. BARDOFF
LAURENCE J. BARDOFF
Petitioner

APPENDIX I

IN THE SUPREME COURT OF CALIFORNIA
En Banc

[Filed Oct 1, 2008]

Case No. S166341

LAURENCE J. BARDOFF,
Petitioner,

v.

COMMITTEE OF BAR EXAMINERS OF THE
STATE BAR OF CALIFORNIA,
Respondent.

The Petition for writ review is denied.

Kennard, J., was absent and did not participate.

/s/ George
Chief Justice

APPENDIX J

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S166341

LAURENCE J. BARDOFF,
Petitioner,

v.

STATE BAR OF CALIFORNIA AND THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,
Respondents.

REQUEST FOR REHEARING OF DENIAL OF PETITION FOR WRIT REVIEW

I respectfully request a re-hearing and believe it should be so granted for the following reasons.

My admission to practice as a member of the bar of the United States Tax Court was a federal determination[1]. The California statute (Section 6062 of the Business and Professional Code) recognizes federal classifications stating that to be certified for admission one needs to be "a person . . . admitted to practice in a . . . United States jurisdiction". As I am a "person" so qualified I should be certified for admission. By refusing to recognize my federal classifica-

[1] The United States Tax Court is a court of national original jurisdiction established by Congress under Article I of the Constitution of the United States. 26 USC §§ 7441 and 7442.

tion and the effect of the state statute the Committee of Bar Examiners and the California Supreme Court are denying me my rights to equal protection under the law. Furthermore, in this matter the California Supreme Court is a court of original jurisdiction and by refusing to hear my case I am being denied my right to due process.

For the reasons stated above, I respectfully request a rehearing.

Dated: October 16, 2008

Respectfully submitted,

/s/ LAURENCE J. BARDOFF
LAURENCE J. BARDOFF
Petitioner

APPENDIX K

IN THE SUPREME COURT OF CALIFORNIA

[Filed Oct 17, 2008]

LAURENCE J. BARDOFF,
Petitioner,

v.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,
Respondent.

The petition for rehearing in the above-entitled matter, filed on October 16, 2008, is hereby stricken. (See Cal. Rules of Court, rule 9.18(a).)

/s/ George
Chief Justice